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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Decided on : 06.10.2016**
+ W.P.(C) 297/2013

COMMUNITY WELFARE BANQUET ASSOCIATION DELHI
..... Petitioner

Through: Mr.Ruchir Bhatia, Advocate
versus

GOVT. OF NCT OF DELHI AND ORS. Respondents
Through: Mr.Pankaj Sinha and Ms.Richa Singh,
Advocates for R-1 and R-2.
Mr.Satyakam, ASC, GNCTD with
Mr.Ashok Kumar, AVATO, Ward 59
for R-3.
Mr.Sanjeev Narula, Sr.Standing
Counsel with Mr.Abhishek Ghai,
Adv. for R-4.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

1. The petitioner in this proceeding under Article 226 of the Constitution challenges the vires of Rule 3 (2) (b) (ii) of the Delhi Tax on Luxury Rules, 1996. The petitioner is an association of Banquet Hall Owners. According to its pleadings a large majority of its members are registered dealers under the Delhi VAT Act, 2004. The existing VAT regime in Delhi requires dealers who report return of an annual turnover of more than Rs.20 lakhs, to comply with its provisions and file quarterly returns purporting the details of the transaction for the particular periods. The grievance in these proceedings

is that the Delhi Tax on Luxury Act, 1996 (the Luxury Act), which according to the petitioners clearly bars levy and recovery of luxury tax “*in respect of turnover of receipts for supply of food, drinks and goods such as cosmetics, medicines, nutritional supplements etc. on the sale of which the proprietor is liable to pay tax under the Delhi Value Added Tax Act, 2004*” is sought to be undermined if not entirely diluted by the introduction of the impugned rule, which in effect requires all Banquet Hall Owners (again expansively defined) to include the entire value of the turnover regardless of whether the substantial part or whole of them are subjected to VAT levy. It is urged that given the primacy of the provision under the parent statute i.e. the Luxury Act, the extraction of luxury tax by the Rule mandated inclusion of the VAT turnover, is *ultravires* to rule making power and parent amendment. The petitioners rely upon the constitution bench judgment of the Supreme Court in **Godfrey Phillips India Ltd. & Anr. v. State of U.P. & Ors.** [2005] 139 STC 537 (SC), where entry 62 of the State List was interpreted *inter alia* in the following manner:

"Given the language of Entry 62 and the legislative history we hold that Entry 62 of List II does not permit the levy of tax on goods or articles, in our judgment, the word "luxuries" in the Entry refers to activities of indulgence, enjoyment or pleasure in as much as none of the impugned statutes seek to tax any activity and admittedly seek to tax goods described as luxury goods, they must be and are declared to be legislatively incompetent."

2. The revenue counters the argument of the petitioner and submits that given the broad and expanded definition of term ‘luxury’ which includes provision for accommodation of space provided in the banquet hall that also

includes air cooling, air conditioning and other furniture etc., the rule cannot be characterised as ultravires. It is further submitted that though VAT amounts are excluded by virtue of Section 3 (5), its language states that tax amount would not be levied to the extent “turnover of receipts for supply of food, drinks and goods”; however, the remaining turnover of receipts is liable to luxury tax. It is submitted that in effect Rule 3 (2) (b) (i) and (ii) constitute dimensions of the mechanism for recovery of luxury tax and cannot be per se characterised as ultravires.

3. The revenue elaborates that the impugned rule only clarifies the peculiar situation where a consolidated bill is charged by banquet halls. It only provides a method for bifurcation of the bill by treating 60% of the turnover of receipts as a luxury component. The revenue relies upon a decision of the Kerala High Court in ***M Far Hotels Ltd. v. State of Kerala***, decided on 20.12.2013 in WP(C).30399/2009, which held that where the appellant is not collecting separate rental charges, a similar rule by fiction of law took care of the situation to enable the collection of a certain percentage of the total amount charged. The revenue further relies upon the judgment of the Supreme Court in ***Kunj Behari Lal Butail and Ors.v. State of H.P. and Ors.***, AIR 2000 SC 1069 to say that as long as the power to legislate exists, the adoption of a particular mode or method for recovery of the tax cannot be characterised as illegal. It is also submitted that the judgment in ***Federation of Hotels & Restaurant Association of India v. Union of India*** (1989) 3 SCC 634 and other judgments have upheld “the aspect theory to interpretation of legislative fields”. So viewed, the luxury element or aspect, could correctly be included in the turnover and was done legally under the impugned rule.

4. The Luxury Act defines the taxing event i.e. luxury as follows:

"(i) "luxury" means use of goods, services, property; facilities etc. for enjoyment or comfort or pleasure or consumption by any customer extraordinary to the necessity of life, that is to say:-

(i) accommodation or space provided in a banquet hall which includes air cooling, air conditioning, chairs, tables, linen, utensils and vessels, shamiyana, tent, pavilion, electricity, water, fuel interior or exterior decoration, music, orchestra, live telecast and the like;

(ii) services provided in a gymnasium or health club, which includes services of trainer or personal trainer, steam, sauna and the like;

(iii) accommodation and other services provided in a hotel, the rate or charges for which, including the charges for air cooling, air conditioning, radio, music, extra beds, television and the like, is seven hundred fifty rupees per room per day or more whether such charges are received collectively or separately per room per day.

(iv) facilities or services provided in a spa which includes beauty treatment, manicure, pedicure, facial, laser treatment, massage shower, hydrotherapy, steam both, saunas or cuisine, medispa and the like;"

5. 'Receipt' is defined under Section 2 (m) as the amount of monetary consideration received or receivable by a proprietor or by his agent for any luxury provided in the establishment.

6. 'Turnover of receipts' is defined under Section 2 (r) as follows:

"turnover of receipts" means the aggregate of amount of valuable consideration received or receivable by a proprietor in respect of any luxury"

7. Section 3 is the charging provision; it requires registration of every proprietor who facilitates or provides luxury (as defined by the Luxury Act) in the establishment under his control to the levy of luxury tax in the turnover of receipts calculated according to its provisions. Section 3 (2) defines the quantum i.e. “the rate not exceeding 15%”. Section 3 (3) by dealing fiction includes the service charges which a proprietor may not include in a given case. Section 3 (4) relates to luxury provided in a hotel; and Section 3 (5) – relevant for the purpose of this litigation provides as under:

“The tax shall not be levied and payable in respect of turnover of receipts for supply of food, drinks and goods such as cosmetics, medicines, nutritional supplements etc. on the sale of which the proprietor is liable to pay tax under the Delhi Value Added Tax Act, 2005.”

Sections 3 & 4 obliged the proprietor and firm as a case – given the nature of activity in the ownership thereof, subjects proprietor and firm to the levy of Luxury Tax.

8. Rule 3 of the Luxuries Act reads as follow:

3. Incidence of levy of tax and maintenance of accounts

(1) The proprietor shall be liable for collection and payment of tax for luxury as defined under clause (i) of Section 2 of the Act, provided at the establishment to a customer either directly or indirectly through any person or agency.

(2) The tax shall be levied and collected by a proprietor—

(a) in respect of luxury provided in the establishment (other than banquet hall) on the tariff rate,

(b) in respect of luxury provided in a banquet hall in the manner prescribed below—

(i) where the hiring charges have been collected separately, there shall be levied a tax on such turnover of receipts in respect of hiring charges;

(ii) where charges have been collected on consolidated basis for all the luxury including food component or in any other manner then there shall be levied a tax, on sixty percent of such turnover of receipts by treating it as luxury provided in a banquet hall.

(3) Every proprietor shall maintain—

(a) information of residential accommodation and tariff thereof in respect of hotel in Form 1;

(b) information of luxury provided in gymnasium/health club or spa and tariff thereof in Form 1A exclusively and separately;

(c) daily account of occupancy of residential accommodation in hotel and collection of tax therefor in Form 2;

(d) daily account of luxury provided in banquet hall of gymnasium/health club or spa and collection of tax therefor, in Form 2A exclusively and separately; and

(e) monthly abstract of collection and remittance of tax, in Form 3.

(4) The proprietor shall maintain a separate bound register for each of the 'Forms' and shall get each of the pages of such registers serially numbered, sealed and certified by the Commissioner or any officer duly authorized by him in this behalf:

PROVIDED that, in case, a proprietor is maintaining the aforesaid 'Forms' in a computerised manner, then such proprietor shall take a printout of such Form on monthly basis and get each of the pages having auto generated serial

number, sealed and certified by the Commissioner or any officer duly authorized by him in this behalf”

9. It is evident that the levy of luxury tax is upon all those incidents which are defined as luxury under Section 2 (i). The provisions of the Act lay out the manner of recovery which is through an obligation on the part of the proprietor or firms which provides luxury to register itself and collect luxury tax charges, from its customers in respect of the luxury service provided by it. At the same time Section 3 (5) incorporates an important exclusionary principle. Given that the legislature was conscious of an element of overlap in the broad nature of the levy and also the circumstance that the overlap can be in respect of two different heads of taxation which are within the exclusive domain of the State legislature, as a matter of policy in this present instance the provision – Section 3(5) embodies an important and salient principle i.e. excludes all those items for luxury which were also subjected to DVAT levy.

10. The argument of the revenue is that Rule 3 (2) (b) (ii) only supplements and does not in any manner undermine the principle contained in Section (3) (5) of the Act. This court is unpersuaded by the submission. One of the submissions made by the revenue is that the component of luxury includes the hiring of the property in the present instance i.e. banquet halls. In order to support its argument that the impugned rule cannot be held to be ultravires, reliance is placed upon the judgment of Kerala High Court in **M Far Hotels Ltd.’s** (supra). This court is of the opinion that that ruling is inapplicable because a plain reading of Rule 3C of the Kerala Rules brings out the circumstance that there was no separate provision for luxury to the extent dealt with hiring out of premises. In the present case, there is

however, a separate provision by way of Rule 3 (2) (b) (i). The petitioners do not dispute that. Furthermore and more crucially the Kerala judgment of *M Far Hotels Ltd.'s* (supra) or the discussion by the High Court nowhere reveals that a provision akin or similar to Section 3 (5) existed.

11. As far as the argument with respect to “aspect theory” is concerned, the court is again unimpressed. The aspect theory is usually in the context of conflict between two legislatures – classically Federal & State or Provincial Legislatures. It has never been resorted to in case of legislation by the State under two heads. It is ofcourse quite likely that one activity may itself lead to two taxing incidents. But what is confronted here is the setting up of a subordinate legislation against a parent enactment. It is here that the general principle that rules can only supplement but never supplant the provisions of the Act is squarely applied. Whilst the general submissions of the revenue with respect to autonomy as regards the mechanism and the policy connected with it for the recovery are undoubtedly correct, in this instance its submission that such mechanism is nowhere confronted with a provision of the main Act is insubstantial.

12. During the course of the hearing, the revenue had suggested that there is a radical difference between the threshold required for luxury tax levy on the one hand and the DVAT levy on the other. This argument too has to fail. There is no doubt that in the present case, the thresholds are fulfilled. Furthermore, what is important is not the collection but the subjecting of the incidents of taxation. As long as the activity answers description provided by the legislature – in the present instance of luxury, it would be subjected to tax. Equally, as long as there is a sale or transfer of goods or right to use the goods or other services which are purportedly a subject of VAT, that the

dealer is subjected to actual levy and collection at a higher threshold is a matter of detail. The levy exists per se by legal definition. It is this aspect which is crucial rather than the existence of higher or lower threshold as is urged by the revenue.

13. For the above reasons, this court holds that the impugned rule i.e. Rule 3 (2) (b) (ii) is ultravires. It is hereby set aside/quashed. The writ petition is allowed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

OCTOBER 06, 2016
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